(2)

No. 03-1714

Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL MINNIS & ASSOCIATES, P.C.,
Petitioner,

v.

KAW NATION,
Respondent.

On Petition for A Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma, Division III

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether this Court should overturn the decision of the Oklahoma Court of Civil Appeals, Division III, which affirmed dismissal of Petitioner's fee collection suit against the Kaw Nation Indian Tribe without prejudice to its refiling in the tribal court, when the validity of an alleged waiver of sovereign immunity was questioned and Respondent presented uncontroverted evidence which showed:

   A. A decision of the Kaw Nation Supreme Court which held that the alleged waiver of sovereign immunity, confession of judgment, and dismantling of the tribal judicial system were wholly void as in violation of the Tribe's Constitution and of preliminary injunctions issued by the tribal district court;

   B. The underlying contract in suit contained an express stipulation to the jurisdiction of the tribal courts;

   C. The challenge to state court jurisdiction was authorized by the General Council of the Tribe;

   D. A stay of a claimed retrocession of judicial functions; and

   E. An existing, functioning tribal judicial system.

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INTRODUCTION

KAW NATION, a federally recognized self-governing Indian Tribe (herein Kaw Nation, Nation, Kaw Tribe, or Tribe), responds to the Petition for Writ of Certiorari filed by Michael Minnis & Associates, P.C. (Minnis).

Minnis seeks review of a decision of the Oklahoma Court of Civil Appeals, Division III (CCA), which affirmed a state district court dismissal of its fee collection state court petition without prejudice to its refiling in the Kaw Nation tribal court.[1]

The Petition should be denied. Minnis has raised no substantial federal question to justify a grant of certiorari under Supreme Court Rule 10.

Dismissal without prejudice to refiling in tribal court was not, as Minnis complains, an adjudication of internal tribal issues. Rather, it was recognition by the state district court and the CCA that the alleged waiver of sovereign immunity and the alleged confession of judgment, both of which the Tribe had adjudicated to have been wholly void, should not now be relitigated in state court. This is not an unusual or unexpected result. In the underlying contract that Minnis sought to enforce in state court, Minnis stipulated to jurisdiction in the courts of the Kaw Nation.

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[1] The decision is now reported as *Michael Minnis & Associates, P.C. v. Kaw Nation*, 90 P.3d 1009, 2004 OK CIV APP 36 (Okla.Civ.App., Div. 3, Dec 18, 2003) (See App. 1)

Despite political ambitions by Minnis and its clients to abolish the tribal judiciary and substitute a Court of Indian Offenses (CFR Court) operated by the Bureau of Indian Affairs (BIA) of the Department of Interior (DOI), the Kaw tribal courts remained open and operating by proper legal process.

Minnis filed a federal action seeking to close the Kaw Nation courts. Instead, the U.S. District Court for the Western District of Oklahoma (DCWDO) held that the Kaw tribal court had the right to determine its own jurisdiction and eventually dismissed the action for failure to present a federal question since the issues raised matters of internal tribal dispute.

After the DCWDO ordered dismissal and dissolved a temporary restraining order against a tribal judge, the Kaw Nation Supreme Court issued a briefing schedule, determined that Kaw Nation courts had jurisdiction, held that Minnis's clients could not abolish the Kaw judiciary, a constitutional branch of the Nation, and also held the Minnis waivers of sovereign immunity void.

The Oklahoma CCA declined relitigation of those issues and did not ignore determinations of the Secretary of the Interior which Minnis claimed were controlling. The contentions Minnis relied upon were in a brief filed by a U.S. Attorney on behalf of the DOI in a parallel litigation. Minnis fails to discuss the decision of a DOI administrative law judge (ALJ) who acted upon appeals brought by Guy Munroe and other members of the Tribe's Executive Council to halt the transfer of judicial authority to the CFR court: the

ALJ determined that the Secretary's attempt to reassume jurisdiction over Kaw Nation judicial functions was improper and violated the Tribe's Constitution.

Guy Munroe is not a "stranger" to this proceeding as Minnis contends. Munroe is the Tribal Chairman charged by the Kaw Nation Constitution to cause the laws of the Kaw Nation to be faithfully executed. He is a natural representative of the Nation and the Nation's interests.

Munroe entered the action for the Nation not only in his own right as a tribal representative, but at the direction of the governing body General Council (GC) of the Nation which opposed numerous actions of certain members of the Executive Council (EC) represented by Minnis. The GC approved a resolution which opposed the waiver of sovereign immunity and specifically authorized Munroe to assert sovereign immunity and defend the Nation in the action brought by Minnis.

A consideration and grant of the Minnis Petition would require that this Court find some substantial federal interest in Minnis's simple refusal to pursue his alleged contract claim in tribal court despite his bargained-for stipulation of tribal court jurisdiction as a material term of the contract. It would require an examination and review of internal tribal matters which are nonfederal matters beyond the jurisdiction of this Court at this stage of the litigation.

As such, this case falls far outside the boundaries of this Court's Rule 10. The Petition should be denied.

COUNTER-STATEMENT OF THE CASE

Respondent does not agree that the statement of the case presented by Petitioner is an accurate or complete statement of facts material to consideration of the questions presented by this case. While the Oklahoma CCA's recitation of facts is an accurate statement of those facts necessary to its decision (*Pet.*, App. 2-8), Petitioner has omitted or incompletely stated essential facts in the body of its Petition which belie its allegations of tribal lawlessness.

Under Rule 15.2 of the Rules of this Court, the Respondent must correct ". . . any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Accordingly, the Court's attention is respectfully drawn to the following additional information from the appellate record presented to the Oklahoma CCA.[2]

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[2] Citation is made herein to two parts of the record:

Minnis filed a tabbed Record on Accelerated Appeal which will be referenced as (Rec., Tab ___, p. ___);

Respondent filed a Supplemental Record on appeal which will be referenced as (Supp. Rec., Tab ___, p. ___).

A. THE KAW NATION GOVERNMENT.

This action arose during an internal conflict of governance between members of the Executive Council (EC) of the Kaw Nation in dispute with the Chairman/CEO of the Kaw Nation and the General Council (GC) of the Kaw Nation. Among other matters, the conflict involved actions of four members of the EC and the validity and continued operation of the Kaw Nation judicial system.

The Kaw Nation is a federally-recognized sovereign Indian Tribe organized pursuant to the *Oklahoma Indian Welfare Act* of June 26, 1936, 49 Stat. 1967, codified at 25 U.S.C. §501, *et seq.*

The Kaw Nation is autonomous and possessed of inherent powers of self-government under a Constitution adopted by the Tribe and approved by the Deputy Assistant Secretary of Indian Affairs of the DOI. (Supp. Rec., Tab 10, Ex. B, p. 16)

Guy Munroe is the Chief Executive Officer of the Kaw Nation and is charged with various responsibilities for the Tribe. Under Article III, Section 2 of the Kaw Constitution, Munroe has authority over and the obligation for ". . . general supervision of the affairs of the General Council and Executive Council and shall perform all duties pertaining to the office of Chairman, including the authority to cause laws of the Kaw Nation to be faithfully executed and obeyed, and to carry out obligations entrusted to the office of Chairman." (Supp. Rec., Tab 10, Ex. B, p. 6)

The General Council (GC) is a governing body under the Kaw Constitution and is an assembly ". . . of all members of the Kaw Nation, not adjudged mentally incompetent by a court of competent jurisdiction, who are eighteen (18) years of age or older in council assembled." Kaw Constitution, Art. II, Sec. 1 (Supp. Rec., Tab 10, Ex. B, p. 2). In essence, the GC is a general Kaw tribal meeting.

The Executive Council of the Kaw Nation (EC) is a governing body which consists of seven members: Chairman, Vice-Chairman, Secretary, and four (4) Council Members elected pursuant to an election ordinance approved by the General Council. Kaw Constitution, Art. II, Sec. 3. (Supp. Rec., Tab 10, Ex. B, p. 3)

The Kaw Constitution provides for a Supreme Court and inferior courts established by law as courts of general jurisdiction. Kaw Constitution, Art. V, Sec. 1, 2 (Supp. Rec., Tab 10, Ex. B, p. 10)

The Kaw Courts have special power of judicial review over actions of the General Council, Executive Council, or any other officers to determine whether those actions are prohibited by federal law, the Kaw Constitution, or the laws of the Kaw Nation, and may enter injunctions or declaratory judgments when such violations are found. Kaw Constitution, Art. V, Sec. 6 (Supp. Rec., Tab 10, Ex. B, p. 11)

B. THE INTERNAL DISPUTE.

Four members of the Executive Council (EC4), who were and continue to be represented by Minnis, became

dissatisfied with decisions of the Kaw Nation courts including ongoing proceedings in removal instituted by Munroe.[3]

In response to various rulings unfavorable to their position, the EC4 sought to abolish operation of the Kaw Nation judiciary and transfer these functions to a Court of Indian Offenses operated under the Code of Federal Regulations (CFR) by the Bureau of Indian Affairs (BIA) of the Department of Interior (DOI), an action opposed by Chairman Munroe and which caused considerable dispute within the Nation, especially the General Council.

Tribal courts continue to operate despite the alleged vote of abolishment by the EC4. Munroe and another EC member sought and received injunctions from the Tribal District Court which enjoined votes of abolishment, the waiver of sovereign immunity, and payment to Minnis. (Supp. Rec., Tab 10, Ex. C and D) In December of 2002, Munroe brought suit in the Tribal District Court on behalf of the Tribe to challenge fees paid to Minnis as in violation of the Kaw Constitution in that the EC4 had a material interest in payment of those fees. Munroe obtained service on Minnis, and Munroe's action predated and was pending at the time of filing of Minnis's fee case in the Oklahoma County District Court. The tribal court case number is No. CIV-02-27 and a copy of the petition is in the record on appeal. (Supp. Rec., Tab 10, Ex. A)

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[3] The EC4 members are Clyde McCauley, Clark Pepper, Martha Spotted Bear, and Jesse Mehojah and are identified in the alleged Resolutions submitted by Minnis. (Rec., Tab 4, Ex. E)

Munroe had instituted removal proceedings against members of the EC4. The Kaw Constitution provides for removal proceedings for members of the Executive Council by action filed in the Kaw District Court. Kaw Constitution, Art. IV, Sec. 2 (Sup. Rec., Tab 10, Ex. B, p. 8) Munroe was supported by two other members of the EC. These removal proceedings were subsequently completed as to McCauley and Pepper, resulting in orders of their removal. See *In the Matter of McCauley*, No. CIV-02-12, DC Kaw Nation, Order of Removal (Supp. Rec., Tab 5, Ex. O); *In the Matter of Pepper*, No. CIV-02-13, DC Kaw Nation, Order of Removal (Supp. Rec., Tab 5, Ex. P).

Mr. McCauley and Mr. Pepper did not appeal the Orders of Removal. Their vacancies were filled for the remainder of the unexpired term by majority vote of the General Council at a regular meeting. See Kaw Constitution, Art. II, Sec. 3(d)(Supp. Rec., Tab 10, Ex. B, p. 4) and General Council Resolution 03-42, (Supp. Rec., Tab 5, Ex. B)

C. THE MINNIS FEDERAL SUIT AND THE DECISION OF THE KAW SUPREME COURT.

Despite the preliminary injunctions of the tribal district court, the EC4 voted to abolish the tribal courts and transfer the judicial function to the CFR court operated by the BIA, claiming in part that certain tribal judges had never been confirmed.[4]

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[4]At its December 15, 2002 meeting, the GC confirmed Phil Lujan as (continued...)

To enforce the resolution of abolishment, Minnis, on behalf of the EC4, filed an action in the U.S. District Court for the Western District of Oklahoma (DCWDO) against Tribal District Judge Phil Lujan, Munroe, and justices of the Kaw Nation Supreme Court seeking to enjoin their exercise of judicial authority. After filing of Minnis's federal suit, the Kaw Supreme Court entered an order staying the docket of the Tribal District Court. (Supp. Rec., Tab 4, Ex. O, p. 6) Nevertheless, at a hearing voluntarily attended by Lujan, U.S. District Judge Vickie Miles-LeGrange entered a temporary restraining order.

Munroe and Lujan filed motions to dismiss. After response, Judge Miles-LeGrange dismissed the action and dissolved the TRO, finding that because the existence of the tribal courts was facially apparent and the resolution of the question of the judicial officers' authority under the Kaw Constitution was an internal tribal matter, the tribal courts were entitled to determine their own jurisdiction before any federal review. (Supp. Rec., Tab 4, Ex. L, p. 13-15)

Minnis filed a Motion for Order for Relief from Judgment and a Motion to Amend the Judgment. The District Court then sought briefing and subsequently held that the question involved was the constitutional authority of Kaw

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[4](...continued)
Tribal District Court Judge. (Supp. Rec. Tab 4, Ex. M, p. 6-10 (Minutes of GC Meeting). At a special meeting on February 9, 2003, the GC passed Resolution No. 3-13 and reconfirmed Charles Tripp, Charles Morris and Michael McBride as Justices of the Supreme Court. (Supp. Rec. Tab 4, Ex. N)

judges which was purely intra-tribal in nature and not within the jurisdiction of the court as a federal question, and dismissed the action completely. (Supp. Rec., Tab 6, Ex. G, p. 6-7) A final judgment was entered.[5] (Supp. Rec. Tab 6, Ex. H)

After the federal district court dissolved its TRO, the Kaw Nation Supreme Court (KNSC) ordered further briefing.

The KNSC subsequently entered an order that determined that the tribal district judge was properly seated; upheld the validity of the removal proceedings and of the temporary restraining orders and preliminary injunctions entered by Judge Lujan against the EC4; disqualified Minnis from the representation of the EC4; acknowledged its explicit authority under the Kaw Constitution to review decisions of the Executive and General Councils; upheld the invalidity of a variety of resolutions passed by the EC4 (including the Court Abolishment Resolution) because the EC4 were facing removal proceedings, the resolutions were taken to thwart the adjudicatory powers of the court and to stop the judge and justices from exercising proper authority, and that each of the EC4 had a personal interest in the resolutions that they voted upon in defiance of the court injunction.[6] The Kaw

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[5] Minnis has appealed this decision to the Tenth Circuit. *Kaw Nation, ex rel. v. Lujan, et al.*, No. 03-6213, Tenth Circuit. The matter is still pending.

[6] The actions of the EC4 and Minnis's arguments based on them suffer from other constitutional infirmities. Under the Kaw Nation Constitution, the power of the Executive Council to take certain actions

(continued...)

Supreme Court also dismissed all contempt citations then pending. (Supp. Rec., Tab 5, Ex. Q)

After the Kaw Supreme Court decision, the Kaw District Court set the removal proceedings for McCauley and Pepper for hearing and issued notice. After hearing, the Court removed both McCauley and Pepper. (Supp. Rec., Tab 5, Exs. O, P)

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[6](...continued)
is subject to approval of the Kaw General Council. See Kaw Constitution, Art. II, Sec. 4(b)(2)(Supp. Rec. Tab 10, Ex. B, p. 6) Included within these restrictions are the "establishment, enactment, amendment, or repeal of ordinances respecting tribal elections or recall and removal of tribal officers," which are not effective unless approved by the General Council. This was the holding of the Kaw Nation Supreme Court in its 3/5/03 Order. (Supp. Rec. Tab 5, Ex. Q, p. 20-21):

> . . . Art. II, §2(b) prohibits the Executive Council from taking certain actions without approval of the majority vote of the General Council. One of those actions is §2(b)(2) "[t]he establishment, enactment, amendment, or repeal of ordinances respecting tribal elections or recall or **removal of tribal officers.**" (emphasis added). The pending adjudication of the removal actions is well within this constitutional provisions. We find that the Executive Council's actions on December 12, 2002 were calculated to interfere with court proceedings considering removal of each member who voted on the measures. Therefore, all such resolutions "shall be of no effect until the General Council has approved them." Art. II, §2(b). No approval followed. On December 15, 2002, the General Council took just the opposite action in approving the selection of Judge Lujan as the District Court Judge.

D. ADMINISTRATIVE APPEALS OF DOI ATTEMPTS TO TAKE OVER TRIBAL JUDICIAL FUNCTIONS.

Minnis and the EC4 enlisted the BIA and Office of Self-Governance (OSG) in the DOI in the takeover ("retrocession") of the courts. The BIA issued letter rulings indicating it would assume judicial authority of the Tribe.

The Kaw Nation through Chairman Munroe and other members of the Executive Council, Wanda Stone and Guyetta Monroe-Martin, appealed these decisions through administrative procedures of the DOI to the Interior Board of Contract Appeals (IBCA).[7] Despite the administrative appeal, the BIA failed to stay its actions pending appeal.

After an extended process, Administrative Law Judge Bernard Parrette (with the concurrence of Chief Administrative Judge Candida S. Steel) overturned the decisions of the OSG and BIA which had refused to acknowledge the Kaw judiciary, and held that the authority to resolve these issues lay only with the Tribe:

> As the DCWD [District Court Western District] has tried to make clear in all of its relevant decisions, these

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[7] Munroe's actions were supported by EC Resolution No. 3-46 which affirmed sovereignty of the Kaw Nation and the continued operation of the constitutionally established tribal court system, and disclaimed any request for establishment of a CFR Court (Supp. Rec., Tab 5, Ex. C) and were further supported by a parallel GC Resolution No. 3-44 on the same subject matter. (Supp. Rec., Tab 5, Ex. D) The GC Resolution passed by a vote of 61 for, 0 against, 3 abstentions.

> are manifestly intra-tribal political matters. To deny the Nation the right to resolve them internally is to destroy the very essence of self-determination. The Department had insufficient reason to become involved at the outset, much less on the basis of any kind of urgency. From the record, it appears that the reasons for OSG's intervention were some questionable assertions by the EC4 group and its representatives, which OSG and BIA apparently accepted at face value without notice or investigation.
>
> Appeal of Kaw Nation, ex rel. Guy Munroe, et al. and the Kaw Nation General Council, IBCA 4455A/03, Interior Board of Contract Appeals, July 31, 2003, (Supp. Rec., Tab 7, Ex. A, p. 16)

Judge Parrette held that the Kaw Nation's tribal judiciary was part of its government structure and not a program. The BIA claim that civil and criminal jurisdiction had been "re-assumed" was a violation of the Nation's Constitution. (Supp. Rec., Tab 7, Ex. A, p. 13-14) Judge Parrette also held that the Department's agencies failed to stay the effectiveness of their decisions during the process of appeal and that arguable efforts were made to cut-off the appeal rights of the Kaw Nation. (Supp. Rec., Tab 7, Ex. A, p. 13)

E. THIS ACTION ON FEE COLLECTION.

To obtain payment for fees incurred on behalf of and at the direction of the EC4 and apparently because Chairman Munroe had already initiated litigation regarding the fees in Tribal District Court, Minnis collusively engaged his clients (McCauley, Pepper, Spotted Bear, and Mehojah) to execute an alleged waiver of sovereign immunity. This was an apparent attempt to subject the Kaw Nation to collection actions in the Oklahoma County District Court and to avoid internal tribal processes, either in the action already instituted by Chairman Munroe against Minnis in the Tribal District Court or in any separate action he may choose to file in Tribal Court.

Although Minnis has included the original petition from the Oklahoma State District Court as an exhibit (App. 26-33), Minnis did not include Exhibit C attached to that petition, which is the fee contract for the underlying action. It is part of the original record. (Rec., Tab 2, Ex. C)

What is materially omitted from discussion in the Minnis Petition for Writ of Certiorari is a stipulation of tribal court jurisdiction included in Paragraph 15 of the Contract. (Petition, Rec., Tab 2, Ex. C, p. 5)

Here is how the clause was described in the Oklahoma Court of Civil Appeals decision, Footnote 6 (App. 3):

> On page five of the contract, the parties struck the original typewritten ¶ 15, of the agreement, providing:

> Immunity. For the limited purpose of allowing [MM&A] to enforce this contract, the Kaw Nation hereby waives immunity to suit and agrees that suit may be filed in the state District Court for Oklahoma County. For the purposes of enforcing any money judgment obtained by [MM&A] hereunder, the Kaw Nation also waives governmental immunity as to its non-federal, non-trust assets.

The parties substituted a hand-written ¶ 15, which provided:

> It is understood and mutually agreed that as a material and substantial consideration of this agreement that the parties mutually stipulate to the jurisdiction of the courts of the Tribe.

Minnis filed the petition in Oklahoma County District Court. Summons was issued and a court clerk docket entry on January 22, 2004 indicates that Guy Munroe was served personally on January 13, 2003. (Rec., Tab 1, p. 2)

The purported sovereignty waiver and confession of judgment were executed by the EC4 members who are also individual clients of Minnis and whom Minnis continues to represent in litigation in the appeal of the *Kaw Nation, ex rel v. Lujan* case now pending in the Tenth Circuit. See Footnote 5.

Munroe entered the action to defend on behalf of the Tribe. Munroe filed a Motion to Dismiss based upon

improper venue, tribal sovereignty immunity, prior filing in other court involving same matter, contractual stipulation of tribal court jurisdiction, invalidity of alleged waiver of sovereignty, and an alleged exhaustion of tribal remedies/conflicts of law. (Supp. Rec. Tab 1) Munroe's Motion was supported by his Affidavit. (Supp. Rec., Tabs 1, 10)

Besides Munroe's authority as Tribal Chairman to represent the Tribe in litigation, Munroe's actions were specifically authorized by GC Resolution No. 3-15 (authorizing the "Tribal Chairman to Take Action on Behalf of the Tribe with Regard to the Case of Michael Minnis v. Kaw Nation, No. CJ-2003-118, DC Oklahoma County.")

This Resolution reaffirmed the operation of the Kaw Nation Court System and declared void an alleged Resolution by the EC4 to waive the Tribe's sovereign immunity to permit suit in state court. The Resolution passed 86 to 0 with 1 abstention. (Supp. Rec., Tab 4, Ex. H)

The GC also passed Resolution No. 3-16 demanding the resignations of the EC4 and if they refused, it directed the Chairman to expedite court procedures leading to their removal for mismanagement. The Resolution also passed 86 to 0 with 2 abstentions. (Supp. Rec., Tab 4, Ex. I)

F. REFERENCES BY MINNIS NOT INCLUDED WITHIN THE RECORD.

Minnis has included some references in its Petition which are not part of the Oklahoma CCA record and asks this

Court to rely upon materials and argument not submitted to the CCA. This includes the references to 25 C.F.R. §11.100 (2003)(App. 18) and 29 Federal Register 22728 (April 29, 2003)(App. 19). Although these matters may be subject to judicial notice upon proper request, exhibit copies of these documents were not part of the record in the CCA, nor was argument relying upon their subject-matter presented. Respondent objects to their inclusion and the separate argument advanced in reliance on these exhibits. See *Capitol Square Review Bd. v. Pinette*, 515 U.S. 753, 759-60 (1995)(No review for issue not decided by circuit court nor presented to Supreme Court).

Even if this Court does give consideration to the Notice at 29 Federal Register 22728 (App. 19), its efficacy is suspect in light of the ALJ finding that it was error and a violation of the Kaw Nation Constitution for the BIA to reassume " . . .jurisdiction over civil and criminal matters that occur within the jurisdictional area of the Kaw Nation" and that " . . .it appears that the Assistant Secretary was either badly misinformed or ill-advised as to the urgency of the misnomered 'reassumption.' "[8] (Supp. Rec., Tab 7, Ex.

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[8] Minnis contends in its Petition that because the Kaw Nation is still listed in 25 C.F.R. §11.100 as a CFR Court, " . . . that no evidence supports the conclusion that a Kaw Nation judicial system has been recognized by the federal government." (Pet. 11)

A contention of "no evidence" is as silly as it is incorrect. The Assistant Secretary published a notice that the "Kaw Nation Executive Council passed a motion to return court function to the Bureau of Indian

(continued...)

A, p. 14) The ALJ decision was appealed by Minnis to the Federal Circuit, even though its clients were denied the right to intervene by the ALJ. The decision has not been reversed.

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[8](...continued)
Affairs" (App. 24); that the "Office of Self-Governance . . . advised the Kaw Nation that the funding for the tribal court was being withdrawn" and that the BIA CFR Court would "reassume jurisdiction over matters arising within the Kaw Nation"; "The Kaw Nation's retrocession and closing of its tribal courts creates a jurisdictional vacuum"; and the BIA "must immediately reassume judicial jurisdiction within the Indian country of the Kaw Nation of Oklahoma, until such time as the Nation reestablishes its court in accordance with 25 CFR 11.100(c)." Such references to "return," "the funding for the tribal court," "reassume jurisdiction," "retrocession and closing," "reassume judicial jurisdiction," and "reestablishes its court" all contribute substantial evidence that the federal government recognized a Kaw Tribal Court, because there would have been no need to re-assume any judicial functions or activate a CFR court if tribal courts never existed. (App. 25)

REASONS FOR DENIAL OF THE WRIT

1. NO FACTORS JUSTIFY EARLY REVIEW BY THIS COURT OF A MOTION TO DISMISS SUSTAINED WITHOUT PREJUDICE TO REFILING IN A FORUM PREVIOUSLY AGREEABLE TO BOTH PARTIES.

This action presented to the Oklahoma district court and the CCA on a motion to dismiss contesting an alleged waiver of sovereign immunity.

The disposition by the state district court was dismissal in favor of refiling in the Kaw Nation district court, the last agreed and undisputed forum, the forum best equipped to determine the validity of sovereignty waiver under Kaw law and procedures, and the jurisdiction in which litigation initiated by Guy Munroe involving the contract was already pending.

Because the forum choice and sovereignty waiver were contested, the state court's deferral to the Kaw tribal courts was an efficient and appropriate turn to avoid unwarranted adjudication by a state court of internal tribal procedures.

A court must decide jurisdiction before it may reach the merits of any claim:

> Questions of jurisdiction . . . should be given priority--since if there is no jurisdiction there is no authority to sit in judgment of anything else. See *Steel Co. [v. Citizens for a Better Environment], supra*, at [523 U.S. 83,] 93-

> 102 [(1998)]. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514 (1868).
>
> *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 778-79 (2000)

Had the state district court proceeded and ultimately determined the sovereignty waiver invalid, it would have had no choice but to announce it had no jurisdiction and then dismiss.[9]

This Court requires "compelling reasons" for a grant of certiorari. U.S. S.Ct. Rule 10. The primary claim for relief raised by Minnis is that it is denied its new choice of forum in state court, when that new choice would change the previously agreed designated selection to a forum which, absent proof of an exception, is barred from exercising such jurisdiction. Because the forum selection paragraph of the contract was drafted by hand, it is obvious that selection of a tribal forum was material to the original contract. On this record, this Court is no better equipped to determine the

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[9] "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." 12 Okla. Stat. §2012(F)(3)

validity of the sovereign immunity waiver than the state district court, and for that reason the writ should be denied.

If Minnis prevails in tribal court on the issue of the sovereign immunity waiver and confession, Minnis need not remain in the tribal court but could then dismiss the claim (or counterclaim if raised in opposition to Munroe's Tribal Court action) and return to the Oklahoma District Court.

It is prudent for the state district court to defer to the last uncontested forum agreed to by the parties. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), where this Court held that forum-selection clauses, although not "historically . . . favored," are "prima facie valid." *Id.*, at 9-10. Minnis has not made the "strong showing" required to invalidate the forum selection to which the parties agreed and which in the absence of ". . . fraud, undue influence, or overweening bargaining power . . . should be given full effect." 407 U.S., at 12-13 (footnote omitted). This Court further generalized that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Id.*, at 15. *See Carnival Cruise Lines, Inc., v. Shute*, 499 U.S. 585, 591 (1991)

Finally, this Court has exercised a jurisprudential judgment not to become involved in cases in preliminary stages unless counseled by some special factor justifying intervention. *See e.g., Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993)(Denying certiorari on grounds that district court had not determined appropriate remedy as to admission of women to men-only college);

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327, 328 (1967). The Court generally stays its hand because review prior to final judgment may prolong litigation unnecessarily and result in piecemeal litigation. *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511-12 (1950)

The Petition offers no sufficiently important reason for the expenditure of this Court's resources. See *Pennsylvania v. Bruder*, 488 U.S. 9, 14 (1988) (STEVENS, J. dissenting)("In my judgment this Court's scarce resources would be far better spent addressing cases that are of some general importance 'beyond the facts and parties involved,' *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (REHNQUIST, J., dissenting), than in our acting as "self-appointed . . . supervisors of the administration of justice in the state judicial systems . . .")

2. THE DECISION BELOW IS PLAINLY CORRECT IN THAT THE DECISIONS OF THE OKLAHOMA DISTRICT COURT AND CCA WERE CONSISTENT WITH THIS COURT'S DECISIONS REGARDING TRIBAL SOVEREIGNTY AND THE CONSTITUTION.

Minnis states that "[T]ribal immunity is a matter of federal law" and a tribal waiver of "sovereign immunity 'must be unequivocally expressed.' " (Pet. 7) Those principles favor the Oklahoma district court's decision: not only had the KNSC found the alleged waiver void, the

assertion of sovereign immunity raised by Munroe and the General Council makes any alleged waiver equivocal and thus ineffective. Consequently, the Oklahoma district court's dismissal was consistent with *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940).

Minnis misstates the holding of *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411 (2001) in that the question decided by this Court was not whether three members of the business committee bound the Tribe. That the Tribe entered into the contract was apparently not in dispute.[10]

Instead, the question before this Court was whether an arbitration paragraph was a clear and unequivocal waiver of sovereign immunity and consent to entry of judgment in a court of competent jurisdiction. See 532 U.S. at 414, 415. ("We hold that, by the clear import of the arbitration clause, the Tribe is amenable to a state-court suit to enforce an arbitral award . . .")

C & L Enterprises actually lends support to the decision of Oklahoma district court in that the contest of validity of the waiver of sovereign immunity by Munroe and the General Council demonstrates that the waiver was not "unequivocal."

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[10] Such a misstatement is not casual. The reported decision reflects that Mr. Minnis was counsel in this Court for the losing Respondent Tribe. 532 U.S. at 413.

3. THE CONTENTION THAT THE ALLEGED DETERMINATIONS OF THE SECRETARY OF INTERIOR ARE CONTROLLING IS WITHOUT MERIT.

Minnis states that the Secretary of Interior made certain determinations which Minnis contends foreclose the Oklahoma district court and the CCA from deciding certain questions because their decision, Minnis contends, constitutes improper determinations of "internal tribal matters." (Pet. 9)

Petitioner contends that the CCA found that Munroe represents the Tribe and gave deference to purported "orders" by "three men" and by "Phil Lujan who claims to be a Kaw Nation judge." The Petitioner contends that the CCA relied on a March 4, 2003 "opinion" by these "non-justices" even though the Secretary had noted, Minnis says, that the KNSC itself had no legal existence. (Pet. 10-11)

First, the Counter-Statement of the Case (see p. 4) and the CCA decision show that by dismissing without prejudice to refiling in the Kaw Nation District Court, the Oklahoma District Court and the CCA properly respected the ability of the Kaw Nation to make its own internal decisions and did not abrogate any tribal decision.

Second, it is equally obvious that the federal district court proceedings in the Western District of Oklahoma authorized the processes of the KNSC and Judge Lujan to resolve the internal tribal governance dispute. (See p. 8) The Justices of the KNSC and Judge Lujan exercised proper judicial authority. Minnis was singularly unsuccessful in

obtaining a permanent or even a preliminary court injunction in the Western District of Oklahoma to stop the ongoing tribal judicial processes. Nor does the Petitioner seek relief against the tribal courts by directly challenging their jurisdiction in ongoing proceedings. Instead, Petitioner ignores the tribal courts and mounts collateral attacks on them at its peril.[11]

Third, Minnis's contentions of "controlling" declarations by the Secretary of the Interior are taken from a brief of argument of an Assistant U.S. Attorney in separate litigation (*Kaw Nation v. Norton*, No. CIV-2003-628-M (USDC WD Okla, 2003))[12] and are just that, an argument. Minnis

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[11] Nor should Minnis be permitted to choose a path into state court as a means of defiance of the authority of the tribal courts. The solution to a dispute over the validity of the Tribal Court's orders is to appeal, and not to disobey the orders in direct defiance of the Court's authority:

> We begin with the basic proposition that all orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect. *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922); *Worden v. Searls*, 121 U.S. 14 (1887).
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> *Maness v. Meyers*, 419 U.S. 449, 457-58 (1975)

[12] This suit was instituted by the Kaw Nation in the U.S. Western

(continued...)

ignores that these contentions of the Secretary now have no force of law and fails to disclose to this Court that they were the subject of reversal by the DOI ALJ as noted in the Counter-Statement of the Case, and are still on appeal.

Fourth, the contention by Minnis that Tribal Chairman Guy Munroe does not represent the Tribe is inconsistent with the decision of ALJ Parrette (Supp. Rec., Tab 7, Ex. A, p. 15) who recognized Munroe as the

> . . . official who not only headed the Executive Council but who was the Chief Executive Officer of the Nation as well. During the period of the pendency of this Appeal, he was expressly authorized by the General Council to challenge the Department's action accepting the purported 'retrocession.' He was also sustained by the General Counsel when he sought the removal of two of the EC4 group and then replaced them with new Executive Council members who agreed with him that the Nation's judicial functions should not be retroceded to BIA.
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> Parrette ALJ, Decision (Supp. Rec., Tab 7, Ex. A, p. 15)

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[12](...continued)
District of Oklahoma seeking to enjoin ongoing actions by the BIA to dismantle the Kaw Nation Judiciary. While Judge Miles-LeGrange denied the Nation's preliminary injunction, ALJ Bernard Parrette subsequently granted a stay of the "retrocession" of the tribal courts and eventually entered a permanent order forbidding removal of the tribal courts. (Supp. Rec., Tab 6, Exs. I, J, K, L; and Tab 7, Ex. A)

4. PETITIONER DID NOT PROPERLY RAISE BELOW ITS CONTENTIONS OF VIOLATION OF DUE PROCESS OR DENIAL OF FAIR OPPORTUNITY TO LITIGATE SOVEREIGN IMMUNITY OR STANDING, AND THEY ARE WITHOUT MERIT.

Minnis contends that it was denied a fair opportunity to litigate sovereign immunity or standing. (Pet. 14-18)

The record in this action includes a copy of the Court Clerk's Docket Sheet[13] (No. CJ-2003-118, DC Oklahoma County)(Rec., Tab 1) which shows that approximately four months passed from the time of filing of the Petition until April 7, 2003 when the action was dismissed by Judge Carolyn Ricks.

During that time, Minnis filed responses to Munroe's Motion to Dismiss and other supplemental filings. Judge Ricks gave notice on March 20, 2003 that she would rule on the briefs. ("3/20/03 Judge Ricks: Motion to Dismiss Motion to Enter Jgmt-Ruling From the Briefs." (Rec., Tab 1, p. 3))

The last set of supplemental material filed by Munroe prior to the Court's ruling on the motions was filed on

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[13] The docket in the Oklahoma County District Court and the Court of Civil Appeals is available on a docket search at www.oscn.net, website of the Oklahoma Supreme Court.

March 14, 2003. Minnis filed a Response on March 20, 2003. (Rec., Tab 1, p. 3)

Minnis made no request for an evidentiary hearing after being given notice that the Court would rule from the briefs.

Once the district judge dismissed, Minnis filed a "Motion for Re-examination of Decision and to Vacate Appealable Orders." (Rec., Tab 9) It included additional exhibits including the Brief of the DOI and a letter from the BIA dated April 8, 2003. Minnis argued the sufficiency of the record. After reconsideration, the District Court denied the Motion for Re-examination on July 7, 2003. (Rec., Tab 8)

The Oklahoma Supreme Court has rules for an accelerated procedure for summary judgments and certain dismissals. See Okla. Sup. Ct. Rul. 1.36. The Rule provides for a collection and assembly of an appeal record. Minnis submitted a record which systematically excluded many of the filings of Munroe. Munroe filed a Supplementary Record.

Appeals are commenced by the filing of a Petition in Error, to which the opposing party is allowed to file a response. The Petition in Error will identify claimed errors. The Rule provides that the record is filed and no briefing is generally permitted under the Rule, but can be ordered by the court. Motions for leave to submit appellate briefs are deemed denied unless positively answered affirmatively. When cases are assigned to the Court of Civil Appeals, a motion to retain jurisdiction by the Supreme Court can be filed, all as provided by the Rule.

After the decision of the CCA affirming the trial court, Minnis filed Appellant's Petition for Rehearing and Brief in Support. The Rehearing Petition raised issues of (1) litigation by a stranger; (2) resolution of inter-tribal matters beyond the jurisdiction of the CCA, contrary to federal law, and unnecessary to a resolution of the suit; and (3) the application of sovereign immunity contrary to Oklahoma case law.

After the Petition for Rehearing was denied, Minnis filed a Petition for Certiorari with the Oklahoma Supreme Court which was denied. The Petition for Certiorari raised two questions: (1) litigation by a stranger and converting an order granting a motion to dismiss to summary judgment; and (2) deciding a question of substance involving the application of sovereign immunity and purporting to resolve inter-tribal matters beyond jurisdiction of the CCA and contrary to federal laws.

Minnis made no separate claim in the CCA or Oklahoma Supreme Court that it was denied due process and therefore any consideration of certiorari on this basis should be declined. See *Capitol Square Review Bd. v. Pinette*, *id.*

In any case, no due process was denied. Under the Oklahoma Supreme Court Rule, Minnis had significant opportunity to raise the claims it now presents.

CONCLUSION

Petitioner's suit is an action for fees against the Kaw Nation based upon an alleged waiver of sovereign immunity and confession of judgment signed by its clients. Even apart from such conflict of interest, the challenge of the validity of the sovereign immunity waiver by the Tribal Chairman and the General Council made the purported waiver equivocal.

Dismissal without prejudice to refiling in Tribal Court was not substituted judgment by the district court and the CCA of tribal matters, but was a referral by the state courts to a tribal forum that could determine the validity of the waiver of sovereign immunity and confession of judgment.

Finally, Guy Munroe was not a stranger to this litigation. He was authorized in his own right as Chairman and by Resolution of the Kaw General Council to enter the litigation and challenge Petitioner's collusive attempt at fee collection.

There is no error here and the Petition should be denied.

Respectfully submitted,

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